regarded as an interested party, to give hearsay evidence that the 4 X-rays had been lost or misplaced. His testimony might be treated as tainted. *A fortiori*, it might even be rejected on the ground of hearsay. This strict rule was reiterated by Lord Tenterden in *Vincent* v. *Cole*[3]:

"I have always acted (perhaps more so than other judges) most strictly on the rule; that what is in writing shall only be proved by the writing itself. My experience has taught me the extreme danger of relying on the recollection of witnesses, however, honest, as to the contents of a written instrument; they may be so easily mistaken that I think the purposes of justice require the strict enforcement of the rule."

In *Strother* v. *Barr*[4] Best C.J. said at page 1018:

"I seldom pass a day in Nisi Prius court without wishing that there had been some written statement, evidentiary of the matters in dispute. More actions have arisen, perhaps from want of attention and observation at the time of a transaction, from the imperfection of human memory, and from witnesses being too ignorant, and too much under the influence of prejudice to give a true account of it, than from any other cause. There is often a great difficulty in getting at the truth by means of parol testimony. Our ancestors were wise in making it a rule, that in all cases the best evidence that could be had should be produced, and great writers on the law of evidence say, if the best evidence be kept back, it raises a suspicion that, if produced, it would falsify the secondary evidence on which the party has rested his case. The first case these writers refer to as being governed by this rule is, that where there is a contract in writing, no parol testimony can be received of its contents unless the instrument be proved to have been lost."

Unless section 65(1) (c) of the Evidence Act 1950 is enforced strictly we may inadvertently allow secondary evidence to come in by the back door and to provide opportunity for a cover-up. Such a practice, in my opinion, would be most unfortunate and particularly so when a layman, a member of the public is suing the Government and a professional man for negligence. I am aware of what Denning L.J. said in *Roe* v. *Ministry of Health & Ors.*[1] at page 136. There Denning L.J. was commenting on professional standard as well as to have regard to the conditions in the hospitals which doctors have to work but here, we are dealing with the burden of proof in a common law tort of negligence. By insisting on strict compliance with the law of evidence, I am merely reiterating that which has always been the accepted practice of the courts in England and in this country, that only admissible evidence should be allowed in a court of law, and that secondary evidence may be admitted if the conditions set out in section 65 have been satisfied.

Applying this to the facts of this case, I would rule that the secondary evidence of the 1st respondent (D.W.1) was not admissible in evidence. I would similarly hold that the testimony of Dr. Narinder Singh (D.W.2) should also be rejected for the same reason. If the testimonies of the 1st respondent and D.W.2 were to be disregarded than in my opinion, on the evidence adduced at the trial, the respondents had failed to discharge the onus of proving the allegations that the deceased suffered these fatal injuries after he was attacked a second time following his discharge from the Casualty Ward.

For the above reasons I would allow the appeal with costs here and in the Court below. The deposit of $500.00 to be refunded to the appellant.

Appeal dismissed.

Solicitors: *Syarikat Richard Ho.*

RIMBUNAN HIJAU SDN. BHD. v. SARAWAK PLYWOOD (M) SDN. BHD.

[S.C. (Seah, Mohamed Azmi & Syed Agil Barakbah S.C.JJ.) October 1, 1984 & April 29, 1985]

[Kuching – Federal Court Civil Appeal No. 11 of 1984]

Practice and Procedure – Arbitration – Appointment of arbitrator by court – Whether interlocutory injunction should be granted – Preservation of status quo – Balance of convenience – Arbitration Act, 1952, s.13(6)(h).

The respondents obtained the right to log 261,910 acres of forest land from the Sarawak Timber Industry Development Corporation and they entered into an agreement with the appellants to subcontract a portion of the concession area for the purpose of felling and extracting merchantable timber under the licence. Disputes arose between the parties and the respondents purported to terminate the agreement. The appellants applied to the court for the appointment of an arbitrator to deal with the disputes between the parties. The learned trial judge made an order for the appointment of an arbitrator but dismissed the application of the appellants for an interlocutory injunction to restrain the respondents from doing certain acts specified pending arbitration. The appellants appealed.

Held: the main consideration is whether the *status quo* ought to be preserved and in considering this the court must determine the matter on the balance of convenience. Considering the facts and circumstances of the case, the balance of convenience did not favour the *status quo* to be preserved because it will result in the work of extracting timber in the concession area coming to a standstill. The respondents have been issued with a permit by the

Forestry Department to fell and extract timber in the said area in lieu of the appellants. From the facts and circumstances of the case also damages will be an adequate remedy to the appellants for the expenditure that they have incurred if they take court action and succeed in proving that the contract has been wrongly terminated by the respondents.

Cases referred to:–

(1) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.
(2) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn Bhd* [1979] 1 M.L.J. 150.
(3) *Hadmor Productions Ltd & Ors.* v. *Hamilton & Ors.* [1982] 1 All E.R. 1042, 1046.

SUPREME COURT.

C.T. Wong for the appellants.
J.C. Fong for the respondents.

Cur. Adv. Vult.

Syed Agil Barakbah S.C.J. (delivering the Judgment of the Court): This is an appeal against the decision of the learned Judge of the High Court Kuching who dismissed with costs the appellants/plaintiffs' Summons-in-Chambers for an interlocutory injunction. The main issue was whether an interlocutory injunction should be allowed pending the decision by an arbitrator of certain issues submitted to him under the terms of an agreement executed between the parties. The answer to this depends not only on the facts and surrounding circumstances of the case but also on the laws applicable thereto.

According to undisputed facts, the respondents/defendants on June 11, 1974 obtained the right to log 261,910 acres of forest land from the Sarawak Timber Industry Development Corporation (STIDC) by virtue of an agreement executed between them. The land is situated at Telang Usan Protected Forest and Lemiting Protected Forest. The respondents were granted a licence by the Director of Forests under the Sarawak Forest Ordinance, Cap. 126 vide Forest Timber Licence No. T/0191. (See pages 113 to 121 of Record). Subsequently on June 19, 1976, the respondents being desirous of sub-contracting for the purpose of felling and extracting merchantable timber under the licence entered into an agreement with the appellants for the said purpose but only for a portion of the concession area described as Unit 6, Lemiting Protected Forest (hereinafter called "the concession area"). The agreement was a straight-forward contract which provided, *inter alia,* the obligations of the appellants as contractor to produce at least 60,000 but not more than 100,000 hoppus tons of timber per year from the concession area and for the said purpose to construct at their own costs main and feeder roads at places duly approved by the Forest Department and to construct all buildings, wharfs and other installations. The appellants were also responsible for the survey of annual coupe boundary and for obtaining the permission of the Forest Department and STIDC to enter the coupe and to fell timber therein. They were also given a right to participate in the marketing of timber so produced and be allocated 50% of the nett profit based on the invoice value of the sale of such timber less the deductions mentioned at clause 12(a). The respondents on the other hand would have to pay the appellants by way of remuneration for timber extracted and delivered in a manner and at the rates as provided by clause 3(1)(a) and (b) and which are subject to review and revision at every twelve months' interval according to clause 13. They had to advance one million ringgit forthwith on the execution of the agreement to the appellants as a loan which was payable by deducting a sum of $10/– for every hoppus ton exported until the whole sum including interest rate at 10% p.a. was fully paid. They had to be responsible for payment of all royalties and premiums due and payable to the Government and the Sarawak Foundation in respect of timber to be extracted under the licence and to pay all premiums due and payable by it with STIDC. Both parties were permitted to terminate the agreement according to clause 10 and to submit any dispute for arbitration under clause 14. Clause 10 states:

"Either party to this Agreement may terminate this Agreement by giving three months notice of its intention to do so, but the Company shall not do so unless –

(a) the Contractor has committed a material breach of this Agreement and the Company has given notice to the Contractor to remedy the breach and the Contractor has failed to comply within a reasonable period after the service of such notice.

(b) a winding-up order is made against the Contractor.

(c) failure by the Contractor to meet the minimum production target prescribed herein but if such failure is caused by contingencies beyond the control fault or default of the Contractor the Company shall not exercise their powers reserved herein."

Clause 14 states:

"In case of dispute arising from interpretation and enforcement of the provisions of this Agreement the matter shall be submitted and to be dealt with in accordance with the Arbitration Ordinance Cap. 45 of Sarawak."

The sequence of events that transpired there-

after is described by the learned Judge as follows:

"Things appeared to have worked well with the parties until 1982 when differences between the parties under the said agreement began to arise. There arose in the first instance a dispute over the issue relating to the right and obligation to review and revise the rate of remuneration under the said agreement, and this was brought about by the Defendants' failure or refusal to act on the Plaintiffs' request for such review and revision. As early as March, 1982, the Plaintiffs had wanted the matter to be arbitrated, but the Defendants apparently would not hear of it and, although more disputes appeared to follow thereafter, no proper steps were taken by the Plaintiffs towards arbitration until November, that year. In the interval, the Defendants were prompted to take a different course of action by reason of certain events which had taken place in September, 1982 and which they regarded as constituting a breach of the said agreement on the part of the Plaintiffs, in that the Plaintiffs had attempted to ship the Defendants' logs on two separate occasions without valid sale contract. By letter dated October 23, 1982, M/s Reddi & Co., solicitors for and acting on the instructions of the Defendants informed the Plaintiffs of Defendants' intention to terminate the said agreement on the ground of the said breach of which the validity was disputed by the Plaintiffs.

By letter dated November 3, 1982 M/s Yong & Co., solicitors for the Plaintiffs, informed the Defendants through their solicitors, M/s Reddi & Co., of the disputes to be arbitrated which may be condensed as to include the first dispute which I have mentioned earlier and two other disputes, namely: one dispute as to the right of the Defendants to deduct 10% of the invoice price of timber sold for the purpose of computing the net profit to which the Plaintiffs were entitled under the said agreement to the extent of 50% thereof, and the other over the repeated and continuous disregard on the part of the Defendants of the provisions of the said agreement relating to time of payment of remuneration; and they also at the same time gave the Defendants notice to the effect that unless the Defendants concurred in the appointment of an arbitrator for the said disputes within 21 days of the service thereof, they would apply to the High Court to appoint an arbitrator pursuant to section 12 of the Arbitration Act, 1952. The notice was, however, not complied with. On December 13, 1982 the Plaintiffs took out an Originating Summons, seeking an order of the court to appoint an arbitrator, and on August 15, 1983 they made this present application for an interlocutory injunction to restrain the Defendants from doing the acts specified above pending arbitration. (See pages 46-48 of the record). It may, perhaps, be mentioned that the Originating Summons, after several adjournments, came before me together with the present application and on November 25, 1983 I allowed the application under the Originating Summons and made an order pursuant to section 12 of the Arbitration Act, 1952, appointing the person named therein to act as an arbitrator under the arbitration clause contained in the said agreement."

In dismissing the summons for interlocutory injunction, the learned Judge applied the principles propounded by the House of Lords in *American Cyanamid Co.* v. *Ethicon Ltd.*[1] These principles have been adopted by this court in *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.*[2] The learned Judge concluded in the first place that there was a serious question to be tried "as to whether the plaintiffs had committed a breach of the said agreement which entitled the defendants to terminate the said agreement", and secondly that the available material had not disclosed the prospect of the appellants succeeding in their claim for permanent injunction in the same terms as the interlocutory injunction sought. As regards the former, we are of the view that the principle does not apply simply because there is no trial pending. No writ has been filed by the appellants against the respondents. With regard to the second, the learned Judge misconstrued the principles in *American Cyanamid case.* In that case, it was held *inter alia* that the court must determine the matter on a balance of convenience in all cases including patent cases once it is established that there is a serious question to be tried. There is no rule that it could not grant interlocutory injunction unless it is first satisfied that the plaintiff would be entitled to a permanent injunction in the same terms as the interlocutory injunction sought if the case was to go for trial on the same available evidence. According to their counsel, the appellants were neither asking for specific performance nor for permanent injunction. All that they were asking the court to do was to restrain the respondents, their servants or agents from interfering with their contractual rights until after the determination of the disputes by arbitration. The respondents had sent them notice to terminate the agreement on the ground that the appellants had committed a material breach of the agreement under clause 10. Thereafter the respondents and their workmen entered the concession area and extracted timber. The appellants however disputed the validity of the respondents' termination of the agreement which they submitted should go for arbitration and pending the determination of the issues by the arbitrator, the *status quo* should be maintained.

An injunction is a form of judicial relief whereby the court orders a party to the proceedings either to refrain from doing specified acts or to do certain specified acts. An interlocutory injunction may be granted if it appears to the court to be just or convenient so to do in order to safeguard the position of one of the parties until his rights can finally be determined at the trial of the action. Section 13(6)(h) of the Arbitration Act 1952 (hereinafter referred to as "the Act") empowers the High Court to grant an interim injunction or to appoint a Receiver in a proper case

and it was under this statutory provision of the Act that the appellants were asking the learned Judge to exercise his jurisdiction, pending the determination of the disputes of the parties by arbitration. Since the appointment of an arbitrator had been made, we are of the opinion that in the exercise of his discretionary statutory power under section 13(6)(h) of the Act the main consideration of the Court is whether or not the *status quo* ought to be preserved. In such a case like the present, the principles enunciated by Lord Diplock in *American Cyanamid case* does not apply to such an application. We do not think that Lord Diplock had this sort of application in mind when he stated his principles in such wide terms.

Before considering the main issue, we remind ourselves of the limited function of an appellate court in an appeal of this nature. As stated earlier, an interlocutory injunction is a discretionary relief vested in the High Court Judge by whom the application was heard. Our function on hearing an appeal, therefore, is not to exercise our own independent discretion and defer to the Judge's exercise of discretion or interfere with it unless the Judge's discretion was based on a misunderstanding of the law or of the evidence before him or on wrong inferences of particular facts drawn by him or where no reasonable Judge regardful of his duty to act judicially could have reached the decision. Initially, the function of the appellate court is one of review only. It is only where the appellate court has reached the conclusion that the Judge's exercise of his discretion must be set aside for one of the reasons stated above that it becomes entitled to exercise an original discretion of its own. (Per Lord Diplock in *Hadmor Productions Ltd. & Ors.* v. *Hamilton & Ors.*[3]). It is clear in this case that the learned Judge misconstrued *American Cyanamid* as explained earlier. We are therefore entitled to exercise our own discretion.

In the instant case, the learned Judge has ordered that an arbitrator be appointed under section 12 of the Act, but refused to order interlocutory injunction. The question that has arisen is whether the court should have made such order as empowered under section 13(6)(h) of the Act pending determination of the disputes by arbitration. As stated earlier, the main consideration is whether the *status quo* ought to be preserved and in considering this the court must determine the matter on the balance of convenience. Considering the facts and circumstances of the case, we are satisfied that the balance of convenience does not favour the *status quo* to be preserved because it will result in the work of extracting timber in the concession area coming to a standstill. The respondents have been issued with a permit by the Forestry Department to fell and extract timber in the said area in lieu of the appellants. (See page 22 paragraph 28 of the affidavit of the appellants' managing director). The appellants' conduct as shown from the affidavits and the relevant documents filed should also be taken into consideration in support of the above. They appeared to have admitted of attempting to ship timber logs out of Sarawak without a valid sale contract on September 9, 1982 and to have undertaken not to repeat it after being served with a notice by the respondents of such breach. However, the respondents alleged that the appellants repeated a similar breach on or about September 21, 1982 and had thereby placed them in danger of their timber licence being cancelled by STIDC. We are also satisfied from the facts and circumstances of this case that damages will be an adequate remedy to the appellants for the expenditure that they have incurred if they take court action and succeed in proving that the contract has wrongly been terminated by the respondents.

For the reasons stated above, we dismiss the appeal with costs.

Deposit to the respondents to account for taxed costs.

Appeal dismissed.

Solicitors: *Yong & Wong; Reddi & Co.*

FABER MERLIN (M) SDN. BHD. & ORS. v. LYE THAI SANG & ANOR. TAN KIM CHUA REALTY (M) SDN. BHD. v. LYE THAI SANG & ANOR.

[S.C. (Abdul Hamid C.J. (Malaya), Wan Suleiman & Seah S.C. JJ.) March 11 & May 18, 1985]

[Johore Bahru – Federal Court Civil Appeals Nos. 79 and 90 of 1984]

Contract – Building contract – Multi-storey complex – Common property – Amendments to building – Service charges – Equitable remedy – Declaration – Discretion of Court – Limitation Act, 1953, s. 32.

Evidence – Construction of written contract – Extrinsic evidence – Evidence Act, 1950, s.92.

Tan Kim Chua Realty (M) Sdn. Bhd. (1st appellant) were the owners of a multi-storey complex, the Merlin